1997

City of Pleasant Grove v. Matthew Auffhammer : Reply Brief

Utah Court of Appeals

Val Morley; Pleasant Grove City Attorney; Counsel for Appellee.
Thomas H. Means; Margaret P. Lindsay; Aldrich, Nelson, Weight and Esplin; Counsel for Appellant.

IN THE UTAH COURT OF APPEALS

CITY OF PLEASANT GROVE,	:	
Plaintiff/Appellee,	:	Case No. 970073-CA
vs.	:	
MATTHEW AUFFHAMMER,	:	Priority No. 2
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FOURTH JUDICIAL COURT, UTAH COUNTY, PROVO DEPARTMENT, FROM A CONVICTION OF DRIVING UNDER THE INFLUENCE, A CLASS A MISDEMEANOR, AND TWO COUNTS OF LEAVING THE SCENE OF AN ACCIDENT, A CLASS A AND CLASS B MISDEMEANOR, BEFORE THE HONORABLE JOHN C. BACKLUND

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ARGUMENT

POINT I

APPELLANT HAS MARSHALED THE EVIDENCE

The City asserts that Auffhammer has failed to marshal all the evidence in support of the trial court's conclusion that Auffhammer was driving under the influence of alcohol (Br. Of Appellee at 8-12). In support of this argument, the City asserts that Auffhammer failed to specific facts in support of Judge Backlund's decision.

One, the City asserts that Rasmussen "described the party he and Auffhammer had attended as an 'alcohol party'" (Br. of Appellee at 10). The fact is that Rasmussen was attending an "alcohol party" while Auffhammer--whom Rasmussen had not met prior to that evening--came to the residence "apartment hunting"

to inquire about renting a room (Tr. at 26-27, 38). *See* Brief of Appellant at 4.

Two, the City asserts that "Rasmussen unequivocally testified that while at the 'alcohol party,' he had seen Auffhammer drinking alcoholic beverages" (Br. of Appellee at 10). However, Rasmussen amended his "unequivocal" testimony on cross-examination to being "pretty sure... I saw him with a beer at one point (Tr. at 55; Brief of Appellant at 5).

Three, the City asserts that "Rasmussen testified he told the police that on the way home from the party, Auffhammer was traveling at a high rate of speed" (Br. of Appellee at 10). Actually, Rasmussen's testimony was only that Auffhammer was "over the speed limit" (Tr. at 30). The "high rate of speed" language comes only from the prosecutor's question (Id.).

Four, the City asserts that Auffhammer has failed to marshal the evidence concerning a prior intersection with a "stop" sign (Br. of Appellee at 10). However, the citation referred to by the City concerns dialogue between the Court and Rasmussen which the City has taken out of context. Rasmussen testified that he might have stopped differently at a previous stop sign (Tr. at 41-42; Br. of Appellant at 5) and the trial court was not certain whether he meant the stop sign at the site of the accident or "some earlier stop sign" so he asked Rasmussen about it (Tr. at 58-59). Rasmussen clarified that it was an earlier stop sign and

that Auffhammer had basically executed a rolling stop past the "sign a little bit" (Tr. at 59). At this point the judge responded "All right. And that was it? That's all you were talking about?" (Id.). Rasmussen then replied "yeah" (Id.).

Five, the City asserts that Rasmussen testified that "Auffhammer was slow to respond to the stop sign" at the site of the accident (Br. of Appellee at 10). Actually, that language comes from the prosecutor's question to which Rasmussen replied "Yeah. I mean--" (Tr. at 31-32). But Rasmussen testified further that what happened at the stop sign was "it just kind of came, came upon us as a surprise" and that he could not see the stop sign located where the accident occurred prior to reaching the intersection (Tr. at 32, 42; Br. of Appellant at 6).

Six, Auffhammer clearly indicates that Rasmussen testified that he told Auffhammer after the accident not to leave the scene but that Auffhammer left anyway (Br. of Appellant at 6). The City's assertion that Rasmussen's testimony clearly indicates "Auffhammer wanted to avoid being identified at the scene so shortly after he had been to an "alcohol party" (Br. of Appellee at 10) is not a fact that Auffhammer has failed to marshal but an inappropriate inference given the known facts of the case.

Seven, the facts surrounding Rasmussen's testimony about his statement to the police, Officer Carter's discussion with Auffhammer at the hospital on the next day, and Officer Smith's

dialogue with Auffhammer are clearly marshaled in Auffhammer's brief (Br. of Appellant at 6-7).

POINT II

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE TRIAL COURT'S CONCLUSION THAT AUFFHAMMER WAS DRIVING UNDER THE INFLUENCE

At trial, Auffhammer was convicted of leaving the scene of an accident and driving under the influence of alcohol. Utah Code Annotated Section 41-6-44(2) (1996 Supp.) sets forth the elements of driving under the influence. Two of the elements of this offense are at issue here: One, whether Auffhammer was "under the influence of alcohol" and two, whether that influence rendered him "incapable of operating a vehicle". Utah Code Ann. 41-6-44(2)(a)(ii).

A conviction for driving under the influence of alcohol requires that a defendant to have consumed alcohol in an amount sufficient to render him incapable of safely operating a vehicle. The only evidence that Auffhammer consumed any alcohol came from Rasmussen's testimony that he was "pretty sure" that Auffhammer had drank a beer at the party (Tr. at 55).

In addition, the only evidence of any driving pattern by Auffhammer was also Rasmussen's testimony. Rasmussen testified that he noticed no driving pattern that would cause him to believe that Auffhammer was intoxicated but that he would have

handled a previous stop sign differently (Tr. at 41, 59). Rasmussen also testified that Auffhammer's speech was not slurred prior to the accident and that he could detect no odor of alcohol.

Based upon this evidence, Auffhammer asserts that there was insufficient evidence to support the trial court's finding that he was driving under the influence of alcohol. Auffhammer was convicted of driving under the influence, not because of evidence indicating that Auffhammer was in physical control of a vehicle while impaired by alcohol, but because "the only reason he would have left in... that injured condition... instead of waiting for medical help was because he was under the influence of alcohol and he didn't want to pick up a DUI" (Tr. at 89-90). The trial court went so far as to call Auffhammer "a liar" although Auffhammer never testified (Tr. at 92). Accordingly, Auffhammer asks this court to reverse the driving under the influence conviction based upon the clear error in the trial court's finding.

CONCLUSION AND PRECISE RELIEF SOUGHT

Because the conviction for driving under the evidence is not supported by the evidence, Auffhammer asks this Court to reverse his conviction of that crime.

DATED this 17 day of November, 1997.

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CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, two (2) true and correct copies of the foregoing Brief Of Appellant to Val Morley, Pleasant Grove City Attorney, 306 West Main, American Fork, Utah 84003 this 17 day of November, 1997.